

FILED '08 SEP 04 14:07 USDJ-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ERYK MYKL MILLER,

Petitioner,

Civil No. 08-665-TC

v.

FINDINGS AND
RECOMMENDATION

J.E. THOMAS,

Respondent.

COFFIN, Magistrate Judge.

Petitioner, a federal inmate currently housed at the Federal Correctional Institution ("FCI") at Sheridan, Oregon, filed a petition for writ of habeas corpus under 28 U.S.C. § 2241, alleging his due process rights were violated in connection with a inmate disciplinary proceeding.

The relevant facts are that petitioner was sanctioned

with the loss of 27 days of good conduct time after Disciplinary Officer (DHO) D. Cortez found that petitioner committed the prohibited act of Making, Possessing, or Using Intoxicants.

The single claim raised in this proceeding is that the BOP violated petitioner's due process rights by failing to provide a certified officer to preside over petitioner's disciplinary proceeding,

Respondent moves to deny petitioner's petition and dismiss this proceeding on the ground that DHO was a certified hearings officer at the time of petitioner's disciplinary hearing.

It is not necessary to review the Wolff v. McDonnell constitutional due process requirements of a prison disciplinary hearing because petitioner does not claim that he was denied any of those rights. Petitioner challenges only the qualifications of the DHO that presided over the hearing.

The BOP provides a certified DHO to conduct administrative fact-finding hearings for misconduct. See, 28 C.F.R. § 541.16. DHO Cortez presided over Petitioner's July 20, 2007, hearing. Respondent's Answer (#9) Exhibit 3.

Respondent has submitted the Declaration of Robert J.

Ballash who is employed by the BOP as the Disciplinary Hearing Administrator at the Western Regional Office. Mr. Ballash declares "under penalty of perjury" that "[o]n July 20, 2007, the date of petitioner's hearing, Mr. Cortez had been fully trained and certified as a DHO and met all qualifications and requirements to act and serve in that capacity." Respondent's Exhibit 4, p. 3. Attached to Mr. Ballash's affidavit is a copy of Mr. Cortez's test results for his Disciplinary Hearings Officer training which indicates that Mr. Cortez passed the DHO certification test on March 2, 2006, with a score of 100%. Id., Attachment 1.

Petitioner speculates, but has no evidence to controvert Mr. Ballash's declaration.

Petitioner's Petition (#1) should be denied. This proceeding should be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written

objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issue and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judges's recommendation.

DATED this 4 day of September, 2008.



Thomas M. Coffin
United States Magistrate Judge